Supreme Court, U.S.
FILED

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In The
# Supreme Court of the United States

**October Term, 2003**

UNITED STATES OF AMERICA,
*Respondent,*

v.

FREEMAN HOLMAN,
*Petitioner.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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77 pp

## QUESTION PRESENTED

Whether a defendant whose trial counsel instructed the jury to find the defendant guilty of one of two temporally and factually related counts of drug dealing, without the defendant's consent and in contravention of the defendant's not guilty plea and his claim of innocence, has received ineffective assistance of counsel such that he is entitled to a new trial, regardless of the strength of the evidence.

## SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Appellate Court No: 01-1535

Short Caption: United States v. Holman

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Supreme Court Rule 29.6.

(1) The full name of every party that the attorney represents in the case:

Freeman Holman

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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227 W. Monroe St.,
Chicago, IL 60606

Nakos Law Office,
126 W. Columbia,
Ft. Wayne, IN 46802

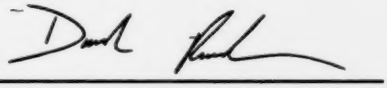
(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: 

Date: 4/14/03

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## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF CONTENTS | iv |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | viii |
| JURISDICTIONAL STATEMENT | 1 |
| CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED | 3 |
| STATEMENT OF FACTS | 4 |
| ARGUMENT | 11 |
| I. WHERE TRIAL COUNSEL INSTRUCTED THE JURY TO FIND PETITIONER GUILTY OF ONE OF TWO TEMPORALLY AND FACTUALLY RELATED COUNTS OF DRUG DEALING, THUS EFFECTIVELY PLEADING PETITIONER GUILTY WITHOUT HIS CONSENT, THIS DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL WAS SUFFICIENT TO REQUIRE A NEW TRIAL, NOTWITHSTANDING THE STRENGTH OF THE EVIDENCE | 11 |
| A. Attorney Nakos' Performance Was Grossly Deficient | 13 |
| B. Attorney Nakos' Deficient Performance Prejudiced Mr. Holman And Deprived Him From Receiving A Constitutionally Fair Trial | 18 |

| | Page |
|---|---|
| CONCLUSION | 24 |
| PROOF OF SERVICE | 25 |
| APPENDIX | 26 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941) | 17 |
| Anders v. California, 386 U.S. 738 (1967) | 12, 13 |
| Boykin v. Alabama, 395 U.S. 238 (1969) | 13, 16 |
| Delaware v. Van Arsdall, 475 U.S. 673 (1986) | 19 |
| Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1091 (1985) | 15, 16 |
| Gideon v. Wainright, 372 U.S. 335 (1963) | 12 |
| Kimmelman v. Morrison, 477 U.S. 365 (1986) | 20 |
| People v. Hattery, 488 N.E.2d 513 (Ill. 1985) | 16 |
| Reeves v. United States, 255 F.3d 389 (7th Cir. 2001) | 20 |
| Strickland v. Washington, 466 U.S. 668 (1984) | 12, 15, 18, 19, 20, 21 |
| United States v. Cronic, 466 U.S. 648 (1984) | 12, 13, 22 |
| United States v. Buford, 727 F. Supp. 461 (N.D. Ill. 1989) | 15 |
| United States v. Holman, 314 F.3d 837 (7th Cir. 2002) | 1, 15, 20, 21 |

| Cases | Page |
|---|---|
| United States v. Garcia, 69 F.3d 810 (7th Cir. 1995) | 18 |
| United States v. Jones, 245 F.3d 645 (7th Cir. 2001) | 17 |
| United States v. Perkins, 937 F.2d 1397 (9th Cir. 1990) | 19 |
| United States v. Sykes, 7 F.3d 1331 (7th Cir. 1993) | 18 |
| United States v. Washington, 969 F.2d 1073 (D.C. Cir. 1992) | 23 |
| United States v. Watts, 519 U.S. 148 (1997) | 17 |
| Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert denied, 454 U.S. 1091 (1981) | 16 |
| Williams v. Brewer, 375 F. Supp. 170 (S.D. Ia 1974) | 19 |
| STATUTES | |
| 18 U.S.C. § 922(g)(1) | 8 |
| 18 U.S.C. § 924(a)(2) | 8 |
| 18 U.S.C. § 924(c) | 8 |
| 18 U.S.C. § 3742 | 1 |
| 21 U.S.C. § 841(a) | 3 |
| 21 U.S.C. § 841(a)(1) | 7, 8 |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 1291 | 1 |
| 28 U.S.C. § 3231 | 1 |
| OTHER AUTHORITIES | |
| Fed. R. Crim. P. 11 | 19, 22 |
| Model Rule of Prof'l Conduct R. 1.4(b) | 15 |
| Model Rule of Prof'l Conduct R. 1.2(a) | 15 |

## OPINIONS BELOW

I. The Judgment in a Criminal Case is unpublished, but is attached hereto as A-4 of the Appendix.

II. The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 314 F.3d 837 and attached hereto as A-16 of the Appendix.

III. The Order of the United States Court of Appeals for the Seventh Circuit denying rehearing and suggestion for rehearing en banc is unpublished but can be found at No. 01-1535, 2003 U.S. App. LEXIS 754 (7th Cir. Jan. 16, 2003) and is attached hereto as A-36 of the Appendix.

IIII. The Order of the United States District Court for the Northern District of Indiana, Fort Wayne Division denying Defendant's Motion to Supplement the Record on Appeal is unpublished, but is attached hereto as A-37 of the Appendix.

In The
# Supreme Court of the United States

October Term, 2003

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No.

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FREEMAN HOLMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the case below pursuant to 28 U.S.C. § 3231. Judgment was entered by the United States District Court for the Northern District of Indiana, Fort Wayne Division on March 1, 2001. The order of the District Court is unpublished. Appellant timely filed a Notice of Appeal on March 1, 2001. The Court of Appeals for the Seventh Circuit appointed the undersigned attorneys to represent Freeman Holman in his appeal on March 21, 2001. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Judgment was entered by the United States Court of Appeals for the Seventh Circuit on December 16, 2002. The opinion of the Court of Appeals is reported at 314 F.3d 837. Appellant

timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc on December 30, 2002. The Appellate Court denied the Petition on January 16, 2003. The Order denying the petition is unpublished but can found at No. 01-1535, 2003 U.S. App. LEXIS 754 (7th Cir. Jan. 16, 2003). This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, U.S. Constitution

## STATUTORY PROVISIONS INVOLVED

STATUTES

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(a)(2)
18 U.S.C. § 924(c)
18 U.S.C. § 3742
21 U.S.C. § 841(a)
21 U.S.C. § 841(a)(1)
28 U.S.C. § 1254(1)
28 U.S.C. § 1291
28 U.S.C. § 3231

## OTHER PROVISIONS INVOLVED

Fed. R. Crim. P. 11

## STATEMENT OF FACTS

This case arises out of the conviction of Defendant-Petitioner Freeman Holman on two counts of possession of cocaine base with intent to distribute, one count of carrying a firearm during and in relation to a drug trafficking crime, and one count of being a felon in possession of a firearm. The evidence at trial related to two encounters between the police and the Petitioner on two different dates, neither of which involved the actual sale of drugs. The same arresting officers were involved in both encounters. There were significant conflicts in the testimony at trial regarding the circumstances of the encounters, and Petitioner's defense rested primarily on casting doubt on the credibility of the prosecution's case.

### A. The July 31, 1999 Incident

On July 31, 1999, Officer Tracey Broxon and Officer Derrick Engleman of the Fort Wayne Police Department were conducting drug surveillance when they observed a person driving, Joyce Lawson, whom they knew not to have a driver's license. (Tr. at 75-76.[1]) The two officers stopped Lawson's car and found a crack pipe in Lawson's purse. (Tr. at 76-77.)

Subsequently, Lawson agreed to set up a drug deal with a person she referred to as "Free." (Tr. at 77.) Officer Broxon accompanied Lawson into Lawson's house, at which time Lawson paged and called "Free." *(Id.)* Officer Broxon heard Lawson state to the person on the other end of the phone that she had fifty dollars and wanted to purchase crack cocaine. (Tr. at 79.) Officer Broxon and Lawson then

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[1] References to the original record on appeal are denoted by (O.R. ). References to the trial transcripts are denoted by (Tr. ) and the appropriate page number. References to transcripts of other proceedings are denoted by the proceeding and the page number, for example the sentencing hearing is denoted by (Sent. Tr. ).

went to a gas station, where Lawson left the police van and used a pay phone to dial an unknown number. (Tr. at 80-81.) Lawson arranged to meet the person she called at the Signature Inn. *(Id.)*

Lawson and Officer Broxon then went to the Signature Inn. (Tr. at 82.) Once at the Signature Inn, Lawson called "Free." (Tr. at 83.) At that time, Officer Broxon saw Mr. Holman walking out of the Signature Inn while talking on his cell phone to Lawson. *(Id.)* The officers took Mr. Holman into custody. The officers seized a cell phone, money, and .68 grams of cocaine base from Mr. Holman. (Tr. at 84-88, 125.) No drug transaction involving Mr. Holman took place on July 31, 1999. (Tr. at 126.)

### B. The October 27, 1999 Incident

Approximately three months later, on October 27, 1999, Mr. Holman left his mother's house to pick up a friend and run some errands. (Tr. at 249-50.) After dropping off his friend, Mr. Holman went to pay some bills and wash his car. *(Id.)* Around 2:00 in the afternoon, Mr. Holman finished paying his bill at the Electric Company and was on his way back to pick up his friend when he noticed a police car was following him. *(Id.)* Mr. Holman testified that he was careful to use his signals and stop at the stop signs. (Tr. at 250.) While signaling to make a right turn, Mr. Holman was pulled over by Officer Broxon and Officer Engleman, the same officers who arrested him on July 31, 1999. (Tr. at 251.)

Mr. Holman pulled over his car and rolled down his window. *(Id.)* He recognized the officers who stopped him as the same officers involved in the July 31, 1999 incident. (Tr. at 251.) Officer Broxon asked Mr. Holman for his license and registration, which he produced. (Tr. at 252).

At trial, Officer Broxon claimed that she did not recognize Mr. Holman's car when she pulled him over on Octo-

ber 27, 1999. She admitted, however, that after she saw Mr. Holman she recognized him as the same person involved in the July 31, 1999 incident. (Tr. at 92-93.)

Officer Broxon showed Officer Engleman Mr. Holman's driver's license over the top of the car. (Tr. at 92-93.) At this point, Mr. Holman noticed another officer standing behind his car. (Tr. at 252.) Mr. Holman got out of his car to see why the other officer was standing behind his car. *(Id.)* Officer Engleman instructed Mr. Holman to get back in the car. *(Id.)* Then, Officer Engleman instructed Mr. Holman to get out of the car, patted him down, handcuffed him and put him in the squad car. (Tr. at 253.)

Officers Broxon and Engleman then searched Mr. Holman's car. The officers testified that during their search of the car they found plastic baggies containing crack cocaine and a nine millimeter revolver. (Tr. at 95, 97, 174, 176.) They also testified that they found bullets, a pill bottle containing a small amount of crack cocaine, and cash in Mr. Holman's pockets. (Tr. at 95, 97-100, 174-77.) Officer Broxon made a radio call for other officers to come to the scene. (Tr. at 103.) Another officer, Officer Stein, came to the scene and took photographs, after which the police towed away Mr. Holman's car. (Tr. at 103-4.) Mr. Holman asked Officer Stein what was going on and Officer Stein responded that the officers had found drugs in Mr. Holman's car. (Tr. at 255.) Mr. Holman replied that the drugs were not his, and told one of the officers he thought the officers put the drugs in the car. *(Id.)*

Officer Broxon's police car was equipped with a videotaping system that could be initiated manually or automatically when the overhead lights were activated. (Tr. at 89-90.) The recording system also was equipped with two microphones for audio recording. The first microphone was in the police car, and was designed to record conversations in the car. (Tr. at 90.) The second microphone was designed to attach to an officer's belt, and was provided to the

members of the Fort Wayne Police Department so that they could record statements made during stops. (Tr. at 131, 134.) However, Officer Broxon did not carry her belt microphone during the arrest of Mr. Holman, however. (Tr. at 90.) Officer Broxon claimed she chose not to wear the lightweight microphone on her belt during the stop of Mr. Holman because of an alleged "back problem." (Tr. at 131, 133.) Officer Engleman was not equipped with a microphone either, and Officer Broxon did not ask him to wear one. (Tr. at 132.) Therefore, there is no audio recording of the arrest until Mr. Holman was placed in the squad car. (Tr. at 131.)

The video camera likewise did not record the full arrest and seizure because Officer Broxon decided to shut if off. (Tr. at 105-06.) The camera was turned off for a full fifteen minutes. (Tr. at 105-06, 126.) Accordingly, the videotape did not record when the officers allegedly recovered a gun out of Mr. Holman's car. (Tr. at 127.) Similarly, the videotape did not record when the officers allegedly recovered the plastic baggies containing crack cocaine. *(Id.)*

## PROCEDURAL BACKGROUND

On November 22, 1999, the grand jury returned a two count indictment against Mr. Holman. (O.R. 5.) Subsequently, On January 26, 2000, the grand jury returned a superseding indictment against Mr. Holman. (O.R. 33.) Count One of the superseding indictment charged that Mr. Holman "[o]n or about July 31, 1999 . . . did knowingly and intentionally possess with intent to distribute controlled substances, including cocaine base 'crack,' a Schedule II Controlled Substance; All in violation of 21 U.S.C. § 841(a)(1)." The government dismissed Count Two before trial. (Tr. at 2, O.R. 93.) Count Three of the superseding indictment, which became Count Two for purposes of the

verdict form submitted to the jury at trial[2], charged that Mr. Holman "[o]n or about October 27, 1999 ... did knowingly and intentionally possess with intent to distribute controlled substances, including cocaine base 'crack,' a Schedule II Controlled Substance; All in violation of 21 U.S.C. § 841(a)(1)."

Count Four of the superseding indictment charged that Mr. Holman, had previously been convicted of a felony and that, on or about October 27, 1999, Mr. Holman possessed a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Count V of the superseding indictment charged that on or about October 27, 1999, Mr. Holman knowingly carried a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c).

Attorney Nikos Nakos ("Attorney Nakos") represented Mr. Holman from initial appearance through trial. (Detention Tr. at 2, Mot. Suppress Tr. at 4, Tr. at 2.) On December 7, 1999, Mr. Holman pled not guilty to all counts of the original indictment. (Detention Tr. at 1-2, 39.) After the superseding indictment was filed, the district court held a subsequent detention hearing and arraignment on February 2, 2000. (O.R. 47.) Mr. Holman again entered a plea of not guilty to all counts. (O.R. 45.)

Jury trial commenced on December 13, 2000, in the United States District Court for the Northern District of Indiana, Fort Wayne Division. (Tr. at 1-2.) In his opening statement, Attorney Nakos admitted that Mr. Holman had possessed cocaine on July 31, 1999, but he at least suggested that this possession was without intent to distribute (as had been charged):

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[2] The court dropped Count II of the superseding indictment and renumbered the remaining counts so that there would be no mention of the dismissed count to the jury.

MR. NAKOS: But on July 31st, 1999, Freeman Holman readily admits that he had cocaine in his pocket. The question is was it with intent to distribute and that's something the jury is going to have to decide. (Tr. at 68.)

Despite the fact that the arresting officer admitted during trial that the amount of cocaine Mr. Holman possessed on July 31st was consistent with a personal use amount (Tr. at 126), in his closing argument Attorney Nakos inexplicably abandoned the mere possession defense and announced Mr. Holman guilty of the drug dealing alleged in Count One and asked the jury to convict Mr. Holman of that count:

MR. NAKOS: I told you from the very beginning that we weren't going to attempt to insult any members of this Jury about the July 31st incident. Yes. He's guilty of that. He told you that. From the very beginning. We don't want to hide anything. We're not trying to lie about anything. And when you go back to the Jury room we want you to look for Count I and Verdict Form 1 and where it says less than five grams, put an "X" there, date it, and sign it, because that's what the evidence showed. He possessed point six eight grams of cocaine. And, as the evidence went in, it certainly appeared that he was going to deliver it to Joyce Lawson. No problem with that, because that's the truth. (Tr. 271-72.)

MR. NAKOS: I ask Ladies and Gentlemen, on behalf of Mr. Freeman Holman to sign Verdict Form 1, which is finding him guilty of Count I, Verdict Form 4, which is finding him not guilty of Count II, Verdict Form Number 6, which is finding Freeman Holman not guilty as charged in Count III, and Verdict Form 8, which is finding him not guilty as charged in Count IV.

I wish you Godspeed in your deliberation. Thank you. (Tr. 282-83.)

Mr. Holman was convicted as charged on all counts presented to the jury. (Tr. at 307-08.)

Immediately after Mr. Holman's conviction, Mr. Holman filed a complaint with the Indiana State Supreme Court Disciplinary Commission, alleging that Attorney Nakos was an incompetent counsel because he had instructed the jury to find Mr. Holman guilty. (Sent. Tr. at 15-16; O.R. 104, See Mr. Holman's letter attached hereto as A-40 to the Appendix.) Mr. Holman's sentencing hearing took place on March 1, 2001. (Sent. Tr. at 2.) Despite Mr. Holman's complaint to the Indiana authorities, Attorney Nakos continued to represent Mr. Holman at the sentencing hearing. *(Id.)* Judge Lee imposed concurrent sentences of 188 months on the drug counts, and a consecutive sentence of 60 months on the section 924(c) count, for a total sentence of 248 months. (O.R. 103.)

Mr. Holman timely filed a Notice of appeal on March 1, 2001. (O.R. 107.) On March 21, 2001 the undersigned attorneys were appointed to represent Mr. Holman in the appeal of his criminal conviction. (O.R. 108.) Among other things, Mr. Holman argued in his appeal that he was entitled to a new trial because Attorney Nakos' instruction to the jury to find Petitioner guilty constituted ineffective assistance of counsel. On December 16, 2002, the United States Court of Appeals for the Seventh Circuit rejected Mr. Holman's request for a new trial, holding that while the conduct of Attorney Nakos was grossly deficient there nonetheless was insufficient prejudice to justify a new trial under the standard articulated in *Strickland*. On December 30, 2002, Mr. Holman timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc, arguing that the Court of Appeals misinterpreted and misapplied the prejudice prong of *Strickland*. The Court of Appeals denied the Petition on January 16, 2003. This Petition for a Writ of Certiorari followed.

## ARGUMENT

### I. WHERE TRIAL COUNSEL INSTRUCTED THE JURY TO FIND PETITIONER GUILTY OF ONE OF TWO TEMPORALLY AND FACTUALLY RELATED COUNTS OF DRUG DEALING, THUS EFFECTIVELY PLEADING PETITIONER GUILTY WITHOUT HIS CONSENT, THIS DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL WAS SUFFICIENT TO REQUIRE A NEW TRIAL, NOTWITHSTANDING THE STRENGTH OF THE EVIDENCE.

There is no dispute that Mr. Holman's trial counsel, Attorney Nakos, instructed the jury to find Mr. Holman guilty of Count One: a count that involved drug dealing and a count as to which Mr. Holman adamantly denied his guilt. Throughout the proceedings below, Mr. Holman persisted in his plea of not guilty to all counts. Nonetheless, in his closing argument Attorney Nakos instructed the jury to find Mr. Holman guilty of Count One, which charged Mr. Holman with possessing crack cocaine with intent to distribute on July 31, 1999. There is no evidence in the record that Mr. Holman consented to this conduct by trial counsel, and in fact Mr. Holman's disapproval of Attorney Nakos' conduct is evidenced by a letter Mr. Holman sent to the Indiana Disciplinary Commission immediately after trial complaining that Attorney Nakos pled him guilty to Count One against his will. [3] Such egregious conduct should be held

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[3] Petitioner moved to supplement the record with Mr. Holman's December 21, 2000 letter to the Indiana Supreme Court Disciplinary Commission. The District Court denied Mr. Holman's motion on the basis that Supreme Court Rule 14(i)(vi) provides that the appendix accompanying the writ may contain "any other material the petitioner believes essential to understand the petition." The District Court's Opinion is attached hereto as A-37 of the Appendix. Thus, Mr. Holman's letter is attached hereto as A-40 to the Appendix.

to be deficient and sufficiently prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984), as to require a new trial because when a trial counsel pleads his client guilty against his will, the entire trial is tainted and the defendant is therefore deprived of the constitutionally fair trial to which all criminal defendants are entitled.

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. See *Gideon v. Wainright*, 372 U.S. 335 344 (1963). The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *United States v. Cronic*, 466 U.S. 648, 656 (1984) (citing *Anders v. California*, 386 U.S. 738, 743 (1967)). The standard that a defendant ordinarily must meet to prevail on a claim of ineffective assistance of counsel is a familiar one. *Strickland*, 466 U.S. at 684. First, the defendant must show "that counsel's performance fell below an objective standard of reasonableness." *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

What constitutes sufficient prejudice necessarily varies depending on the type of malfeasance by trial counsel. *Id.* This Court has said that the essence of the prejudice inquiry is to determine whether trial counsel's errors were so serious as to deprive the defendant of a fair trial, the results of which are reliable. *Id.* One way for a defendant to meet this standard is to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In the present case, the Court of Appeals erred when it focused solely on whether it was probable that Mr. Holman would have been acquitted on Count One in the absence of trial counsel's deficient conduct, and focused not at all on whether the conduct of trial counsel undermined confidence

in the overall trial result. Here, Mr. Holman was denied his Sixth Amendment right to effective assistance of counsel when Attorney Nakos instructed the jury to find Mr. Holman guilty as to Count One despite the fact that Mr. Holman entered a plea of not guilty to all counts and did not consent to Attorney Nakos' change of plea on Mr. Holman's behalf. (Tr. at 282-83.) Mr. Holman was prejudiced because he was denied a "counsel acting in the role of an advocate" *Cronic*, 466 U.S. at 656 (citing *Anders*, 386 U.S. at 743), he was denied the decision to plead "guilty" or "not guilty" based on his intelligent and voluntary choice, *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969), and he was denied the right to an adversarial process where the jury decides the issue of guilt or innocence. Moreover, the prejudicial impact of Attorney Nakos' admissions on Count One was not limited to Count One. In reality, the announcement that Mr. Holman was in fact guilty of the drug dealing alleged in Count One made it far more likely that the jury would convict Mr. Holman of the other drug counts, and it also effectively destroyed Mr. Holman's credibility with the jury.

### A. Attorney Nakos' Performance Was Grossly Deficient

In his opening statement, Attorney Nakos told the jury that a question as to whether Mr. Holman had any intent to distribute the small amount of cocaine he possessed on July 31, 1999:

> MR. NAKOS: But on July 31st, 1999, Freeman Holman readily admits that he had cocaine in his pocket. The question is was it with intent to distribute and that's something the jury is going to have to decide.

(Tr. at 68.)

Despite the fact that the arresting officer admitted during trial that the amount of cocaine Mr. Holman pos-

sessed on July 31st was consistent with a personal use amount (Tr. at 126), and despite Mr. Holman's plea of not guilty to all counts, in his closing argument Attorney Nakos inexplicably abandoned the mere possession defense and announced Mr. Holman guilty of the drug dealing alleged in Count One and told the jury to convict Mr. Holman of that count:

> MR. NAKOS: I told you from the very beginning that we weren't going to attempt to insult any members of this Jury about the July 31st incident. Yes. He's guilty of that. He told you that. From the very beginning. We don't want to hide anything. We're not trying to lie about anything. And when you go back to the Jury room we want you to look for Count I and Verdict Form 1 and where it says less than five grams, put an "X" there, date it, and sign it, because that's what the evidence showed. He possessed point six eight grams of cocaine. And, as the evidence went in, it certainly appeared that he was going to deliver it to Joyce Lawson. No problem with that, because that's the truth.

(Tr. 271-72.)

> MR. NAKOS: I ask Ladies and Gentlemen, on behalf of Mr. Freeman Holman to sign Verdict Form 1, which is finding him guilty of Count I, Verdict Form 4, which is finding him not guilty of Count II, Verdict Form Number 6, which is finding Freeman Holman not guilty as charged in Count III, and Verdict Form 8, which is finding him not guilty as charged in Count IV.
>
> I wish you Godspeed in your deliberation. Thank you.

(Tr. 282-83.)

These statements by Attorney Nakos amounted to a concession of Mr. Holman's guilt, and thus fell below an objective standard of reasonableness. Attorney Nakos' conduct deprived Mr. Holman of his right to have the issue of

his guilt or innocence as to Count One presented to the jury. On appeal, the Seventh Circuit recognized this conduct as deficient and stated;

> [b]y conceding guilt to Count I at the beginning of trial, Holman's attorney bypassed all these rights on behalf of his client: he admitted to those facts that were the elements of Count I; the jury was never given a chance to render a verdict on Count I based on an adversarial proceeding; and during cross examination of the prosecution's witnesses, Holman's attorney did not ask any questions regarding Count I.

*United States v. Holman*, 314 F.3d 837, 843 (7th Cir. 2002), rehearing and suggestion for rehearing en banc denied, No. 01-1535, 2003 U.S. App. LEXIS 754 (7th Cir. Jan. 16, 2003).

As the Court below stated, "*Strickland* imposes few requirements on attorneys, but one it specifically enumerates is 'to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution.'" *Holman*, 314 F.3d at 841 (citing *Strickland*, 466 U.S. at 688). The Court further noted that "such consultation is an ethical cornerstone of the legal profession. *Id.* (citing Model Rule of Prof'l. Conduct R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."; Model Rule of Prof'l. Conduct R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.").

Several other courts have recognized this claim as a Sixth Amendment violation. *United States v. Buford*, 727 F. Supp. 461, 464 (N.D. Ill. 1989) (citing *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1091 (1985) (holding that where a defendant seeks

a not guilty plea, counsel may not concede his client's guilt even if faced with strong evidence against his client)); *Wiley v. Sowders*, 647 F.2d 642 (6th Cir. 1981), cert. denied, 454 U.S. 1091 (1981) (holding that counsel's admission of guilt on behalf of his client denied his client his constitutional right to have his guilt or innocence decided by a jury); *People v. Hattery*, 488 N.E.2d 513 (Ill. 1985) (holding that counsel may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the defendant knowingly and intelligently consented to his counsel's strategy).

The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused, based on his intelligent and voluntary choice. *Boykin*, 395 U.S. at 243-44. Mr. Holman specifically pled not guilty to all counts. (O.R. 45, Tr. at 292.) In *Wiley*, the court explained that "the constitutional right of a criminal defendant to plead 'not guilty,' ... entails the obligation of his attorney to structure the trial of the case around his client's plea." 647 F.2d at 650. The *Wiley* court held that the defendant was denied the effective assistance of counsel when his own lawyer admitted the defendant's guilt without first obtaining the defendant's consent to this strategy. *Id.* The court addressed the prosecution's argument that counsel was engaged in a strategic trial tactic to obtain leniency for his client. *Id.* at 649. The court stated that it was unable to see how trial counsel's statement would aid the defendant's claim of innocence. *Id.* The court in *Wiley* concluded that defense counsel's concession of guilt constituted ineffective assistance of counsel because it nullified petitioner's right to have the issue of guilt or innocence presented to the jury as an adversarial issue. *Id.* Counsel does not have a license to anticipate the effect of conceding his client's guilt simply because an adverse verdict appears likely. *Spraggins*, 720 F.2d at 1194.

In this case, Attorney Nakos failed to structure his case around Mr. Holman's plea of not guilty. To the contrary, Attorney Nakos admitted Mr. Holman's guilt to Count One despite Mr. Holman's clear decision not to concede guilt. (See Mr. Holman's letter attached hereto as A-40 to the Appendix). In an analogous situation, this Court has stated that where the defendant alleges in substance that he pleaded not guilty to the charge set forth in the indictment, and thereafter, without his knowledge and consent, his counsel consented to an agreed statement of facts, which established petitioner's guilt, that the accused's counsel had no authority to change his plea or otherwise stipulate to facts without his consent. *Achtien v. Dowd*, 117 F.2d 989, 993-94 (7th Cir. 1941). This Court further stated in *Achtien* that "in the absence of dispute, either by answer or by evidence, we must accept [the defendant's] allegation as true." *Id.* at 994. In the current case, there is no evidence that Mr. Holman authorized Attorney Nakos to plead him guilty. Rather, at the conclusion of trial, Mr. Holman immediately sent a letter to the Disciplinary Commission complaining that Attorney Nakos insisted on pleading Mr. Holman guilty against his will. (Sent. Tr. at 15, See Mr. Holman's letter attached hereto as A-40 of the Appendix.)

What makes Attorney Nakos' concessions even more perplexing, and what would have made his request for a guilty verdict unreasonably deficient even *with* Mr. Holman's consent, was that under the Sentencing Guidelines as interpreted at the time of trial, conviction on Count One alone subjected Mr. Holman to the same potential sentence as conviction on all three drug counts. In *United States v. Watts*, 519 U.S. 148 (1997), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157 (per curiam). *See also United States v. Jones*, 245 F.3d 645, 651 (7th Cir.

2001) (stating that pursuant to the U.S. Sentencing Guidelines, district courts may still determine a drug offender's base offense level by calculating drug quantities that were not specified in the count of conviction but that the court concludes were part of the defendant's relevant conduct); *United States v. Garcia*, 69 F.3d 810, 819 (7th Cir. 1995) (holding that the district court judge could determine the offense level by considering drug quantities not charged); *United States v. Sykes*, 7 F.3d 1331, 1335-37 (7th Cir. 1993) (holding the Sentencing Guidelines permits a sentencing judge to consider uncharged or dismissed acts as long as they are part of the same course of conduct or common scheme as the offense of conviction). Thus, even if the jury found Mr. Holman guilty of only Count One, the drug charge for which Attorney Nakos instructed the jury to find him guilty, under the current case law the district court could have imposed sentence based on the amount of drugs involved in *all* of the defendant's related conduct, including the drug amounts involved in the counts on which Mr. Holman was *not* convicted. Thus, any "trial strategy" Attorney Nakos may have had in asking the jury to find Mr. Holman guilty of Count One was not viable.

### B. Attorney Nakos' Deficient Performance Prejudiced Mr. Holman And Deprived Him From Receiving A Constitutionally Fair Trial

The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *Strickland*, 466 U.S. at 686. Attorney Nakos' concession of Mr. Holman's guilt as to Count One prejudiced Mr. Holman in several ways: (1) It eliminated the possibility that the jury would find only possession without the intent to distribute, with respect to Count One; (2) It made it more than likely that the jury would convict Mr. Holman of the remaining counts, which charged him with identical conduct

on a different date; (3) It told the jurors that they should disregard Mr. Holman's not guilty plea thereby destroying his credibility; (4) It prevented Mr. Holman from mounting any kind of defense to Counts Two through Four; and (5) It took away all protections afforded by the Due Process Clause of the Constitutional and Rule of Criminal Procedure 11.

The Court of Appeals addressed only one form of prejudice, however. The Court of Appeals limited its inquiry to whether in the absence of Attorney Nakos' deficient conduct it was likely the result as to Count One would have been different. This narrow approach was itself error, and results from what Petitioner asserts is a fundamental misapplication of this Court's holding in *Strickland*. By focusing on whether the Petitioner could have achieved a different result in a fair trial, the Court of Appeals effectively fashioned a rule that will make the promise of effective assistance of counsel and a fair trial unattainable for the defendant facing significant evidence of guilt.

Moreover, the Court of Appeals' analysis even as to Count One does not square with the Sixth Amendment right to counsel. The right to a constitutionally fair and effective trial is not forfeited simply because the evidence is strong. "[E]ven a case involving overwhelming evidence of a criminal defendant's guilt must adhere to the tenets of a constitutional approach to criminal procedure which has as its ultimate goal a fair trial sustaining the rule of law." *Williams v. Brewer*, 375 F. Supp. 170, 186 (S.D. Ia. 1974); see also *United States v. Perkins*, 937 F.2d 1397, 1409 (9th Cir. 1990) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("The Constitution entitles a criminal defendant to a fair trial, not a perfect one.")).

By making the strength of the evidence against the defendant determinative of the ineffective assistance claim, regardless of the depth of trial counsel's errors, the Court of Appeals established a hurdle that no defendant who appears

"obviously guilty" will ever be able to surmount. Certainly the lower court's opinion makes no distinction between a lawyer who involuntarily pleads his client guilty and one who is drunk or one who sleeps through the trial. Under the Court of Appeals' view of *Strickland*, so long as a defendant faces such overwhelming evidence that his conviction seems assured, then no amount of unreasonable and ineffective conduct by trial counsel will result in a new trial. *See Holman*, 314 F.3d at 844-45. This analysis by the Court of Appeals missed the mark. This Court has specifically held that "we have never intimated that the right to counsel is conditioned upon actual innocence. . . Consequently, we decline to hold that [] the guarantee to effective assistance of counsel belongs solely to the innocent . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (holding that counsel's conduct was deficient and remanding to determine if the conduct was prejudicial where counsel had conducted no pretrial discovery and thus failed to file a timely suppression motion on illegally seized evidence); *Reeves v. United States*, 255 F.3d 389, 393 (7th Cir. 2001) (requiring a defendant to prove actual innocence or that the outcome would have more likely than not been different would be an incorrect articulation or application of the prejudice test).

Even more problematic than the error of the Court of Appeals in analyzing the prejudice as to Count One, was the court's refusal to address the argument that was central to Mr. Holman's argument on appeal — that the declaration of Mr. Holman's guilt as to Count One necessarily prejudiced Mr. Holman's defense to the remaining counts of the indictment, including a virtually identical drug possession count. [4]

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[4] With respect to the drug charge in Count Two, the Court of Appeals acknowledged the issue of the prejudice caused by Mr. Holman's attorney's conduct, but did not analyze the issue:

> It is possible that Holman could argue that the concession of guilt to the first cocaine possession count tainted him, making the jury predisposed to thinking of him as a drug dealer when they considered

The issue on this appeal is not, as the Court of Appeals suggested, simply whether it is likely the outcome as to Count One would have been different if Mr. Holman's lawyer had not instructed the jury to find Mr. Holman guilty of that count. The issue is whether Mr. Holman was prejudiced in his defense of all counts, including the *other* counts that related to drug dealing on other occasions, when his trial counsel told the jury to disregard Mr. Holman's denial of guilt and plea of not guilty to the drug dealing alleged in Count One. Because Attorney Nakos' deficient performance undermines confidence in the outcome of the entire trial, the convictions should be reversed. Because the proper application of the *Strickland* prejudice prong in cases where trial counsel was concededly deficient involves a question of exceptional importance, this case is appropriate for review by this Court.

Attorney Nakos began and ended his case by telling the jury that Mr. Holman was guilty of drug dealing, as charged in Count One. (Tr. at 68, 271-72, 282-83.) Count One and Two charged identical drug crimes: possession with intent to distribute an unspecified amount of crack cocaine. (Tr. at 2, O.R. 93.) The only difference in the counts was that they alleged drug dealing on two separate occasions. (Tr. at 2, O.R. 93.) Attorney Nakos' deficient performance, as found by the court below, *Holman*, 314 F.3d at 844, made it virtually impossible that the jury would acquit Mr. Holman of the second drug dealing charge. This is especially true given the fact that Mr. Holman entered the same not guilty plea to both counts. Neither the court below nor the govern-

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the other counts, but the weight of the evidence suggests that this is a dubious argument at best.

*Holman*, 314 F.3d at 845. In fact, Mr. Holman had made precisely this argument (Appellant's Brf. at 19-20, Appellant's Reply Brf. at 2), and the Panel's failure to address it caused the error that favors certiorari in this case. Regardless of the weight of the evidence, the prejudice caused by Attorney Nakos' deficient conduct was sufficient to undermine any confidence in the outcome of the trial.

ment has cited a case that stands for the proposition that an attorney provides effective assistance of counsel when he declares a defendant guilty of the *same crime* as to which he purports to be providing a defense.

Attorney Nakos destroyed Mr. Holman's credibility when he instructed the jury that Mr. Holman was guilty of Count One, despite Mr. Holman's plea of not guilty to that count. Before, during and after trial, Mr. Holman took the same position with respect to all counts: that he was not guilty. Despite this, Attorney Nakos conceded multiple times to the jury that Mr. Holman was guilty of dealing crack cocaine, as charged in Count One, and in so doing effectively told the jury to disregard as frivolous Mr. Holman's plea of not guilty to that count. (Tr. 68, 271-72, 282-83.) All Attorney Nakos accomplished by instructing the jury to find Mr. Holman guilty of Count One was to demonstrate that Mr. Holman would deny guilt when he was actually guilty. Mr. Holman's credibility was especially relevant because it was put at issue when he testified at trial in his own defense. (Tr. at 253-56.)

Attorney Nakos' admonition to the jury was prejudicial not only in the factual sense (in that he urged the jury to find Mr. Holman guilty), but also in the legal sense (in that it deprived him of his Sixth Amendment right to a fair and effective trial). The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Cronic*, 466 U.S. at 656. Mr. Holman was denied both that adversarial process and the right to have counsel acting in the role of an advocate when his trial counsel pled him guilty to Count One against his will and prevented the jury from deciding the issue of guilt or innocence. The extraordinary significance of a defendant's concession of guilt as to any count is reflected in the comprehensive procedural safeguards that attend the acceptance of a guilty plea. *See generally*, Fed. R. Crim. P. 11. Federal Rule of Criminal Procedure 11 "acts primarily as

a safeguard to prevent the hasty acceptance of guilty pleas that are not made knowingly and voluntarily." *United States v. Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992). Here, Mr. Holman suffered all the prejudice that flows from an admission of guilt, but received none of the protections designed to ensure that guilty pleas are only made knowingly and voluntarily. It is a strange result for the Court of Appeals to approve of Attorney Nakos' surrogate guilty plea on Mr. Holman's behalf at trial, when there can be little doubt that a direct plea of guilty by Mr. Holman himself under similar circumstances would fail to satisfy the requirements of Rule 11.

Because the trial conduct of Attorney Nakos constituted ineffective assistance of counsel so egregious that it warrants a new trial for Mr. Holman, this Court should issue a writ of certiorari to the Court of Appeals for the Seventh Circuit.

## CONCLUSION

For the reasons stated above, a petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID S. ROSENBLOOM*
DAWN R. CONNELLY
McDERMOTT, WILL & EMERY
Attorneys for Freeman Holman
227 W. Monroe Street
Chicago, IL 60606
(202) 372-2000

* *Counsel of Record*

In The
# United States Supreme Court

| | | |
|---|---|---|
| United States of America, *Respondent,* | ) | |
| v. | ) | On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit |
| Freeman Holman, *Petitioner.* | ) | |

## PROOF OF SERVICE

It is hereby certified that service of this PETITION FOR A WRIT OF CERTIORARI has been made on Respondent on April 15 2003 by placing two copies in an envelope, with proper postage affixed, addressed to:

Robert N. Trgovich
Office of the United States Attorney
1300 S. Harrison Street
3128 Federal Building
Fort Wayne, IN 46802

and by placing said envelope for delivery in the United States mail.

Respectfully submitted,

Dawn Connelly
*Attorney for Appellant*

## APPENDIX


| | Page |
|---|---|
| Superseding Indictment | A-1 |
| Judgment in a Criminal Case | A-4 |
| Opinion of the Seventh Circuit | A-16 |
| Order of the Seventh Circuit denying rehearing and suggestion for rehearing en banc | A-36 |
| Order of the District Court denying Mr. Holman's Motion to Supplement the Record on Appeal | A-37 |
| Mr. Holman's December 21, 2000 letter to the Indiana Supreme Court Disciplinary Commission | A-40 |

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**FORT WAYNE DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | **SUPERSEDING INDICTMENT** |
| v. | ) | Cause No. 1:99-CR-62 |
| | ) | Violations: |
| FREEMAN HOLMAN | ) | 21 U.S.C. § 841(a)(1) |
| | ) | 18 U.S.C. § 924(c)(1) |

THE GRAND JURY CHARGES:

COUNT ONE

On or about July 31, 1999, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

FREEMAN HOLMAN,

defendant herein, did knowingly and intentionally possess with intent to distribute controlled substances, including cocaine base "crack," a Schedule II Controlled Substance;

All in violation of 21 U.S.C. § 841(a)(1).

THE GRAND JURY CHARGES FURTHER:

COUNT THREE

On or about October 27, 1999, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

FREEMAN HOLMAN,

defendant herein, did knowingly and intentionally possess with intent to distribute controlled substances, including cocaine base "crack," a Schedule II Controlled Substance;

All in violation of 21 U.S.C. § 841(a)(1).

THE GRAND JURY CHARGES FURTHER:

COUNT FOUR

On or about October 27, 1999, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

FREEMAN HOLMAN,

defendant herein, being a person who had been convicted in a court of a crime punishable by imprisonment for a term exceeding one (1) year, that is to say:

> On or about February 15, 1990, Freeman Holman was convicted in the Allen Superior Court, Fort Wayne, Indiana, in case # 02D04-8908-CF-562, of Burglary;

did knowingly possess in and affecting commerce a firearm, to wit: a Smith and Wesson, 9mm Parabellum, revolver handgun, Model 940-1, serial number BRS1279, and eight (8) rounds of 9mm ammunition;

All in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

THE GRAND JURY CHARGES FURTHER:

COUNT FIVE

On or about October 27, 1999, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

FREEMAN HOLMAN,

defendant herein, knowingly carried a firearm, to wit: a Smith and Wesson, 9mm Parabellum, revolver handgun, Model 940-1, serial number BRS1279, during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with the intent to distribute controlled substances, including cocaine base "crack," a Schedule II Controlled Substance;

All in violation of 18 U.S.C. § 924(c)(1).

A TRUE BILL

/s/ [ILLEGIBLE]
Foreperson

DAVID CAPP
UNITED STATES ATTORNEY

/s/ ROBERT N. TRGOVICH

By: Robert N. Trgovich
Assistant United States Attorney
Atty #304215
3128 Federal Building
1300 South Harrison Street
Fort Wayne, IN 46802-3489
Telephone: (219) 422-2595
Facsimile: (219) 426-1616

ORIGINAL
[ILLEGIBLE]

**UNITED STATES DISTRICT COURT**
**Northern District of Indiana**
**Fort Wayne Division**

| | |
|---|---|
| UNITED STATES OF AMERICA | **JUDGMENT IN A CRIMINAL CASE** |
| v. | Case No. 1:99-cr-62 |
| FREEMAN HOLMAN | Nikos Nakos<br>219/420-5455<br>Defendant's Attorney |

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The Defendant:

☐ pleaded guilty to count(s) _____.
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☒ was found guilty on count 1s, 3s, 4s, 5s after a plea of not guilty.

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21:841(a)(1) | Possession with intent to distribute Cocaine Base "Crack"; | 10/99 | 1s, 3s |
| 18:922(g)(1) & 924(a)(2) | Possession of a firearm by a Convicted Felon | 10/99 | 4s |
| 18:924(c)(1) | Carrying firearm during/in relation to drug trafficking crime | 10/99 | 5s |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count ____.
☐ Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
312-70-5936

March 1, 2001
Date of Imposition of Sentence

Defendant's Date of Birth:
10/30/61

Defendant's USM No.: 34716-018

/s/ WILLIAM C. LEE
Signature of Judicial Officer

Defendant's Residence Address:
defendant incarcerated

WILLIAM C. LEE, CHIEF JUDGE
Name & Title of Judicial Officer

Defendant's Mailing Address:
531 E. Woodland
Fort Wayne, IN 46803

MARCH 1, 2001
Date

CERTIFIED
3-1-01
[ILLEGIBLE], CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
/s/ [ILLEGIBLE]
DEPUTY CLERK

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred eighty-eight (188) months on each of counts 1s and 3s, to run concurrently, one hundred twenty (120) months on count 4s, concurrent with counts 1s and 3s, and sixty (60) months on count 5s, to be served consecutively to counts 1s, 3s, and 4s.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal or as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

_____ Defendant delivered on 3/28/01 to FCI Milan, MI at

_____, with a certified copy of this judgment.

/s/ JOHN R. HEMINGWAY, Warden

By /s/ [ILLEGIBLE]

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[ILLEGIBLE] DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years, consisting of 4 years on count 1s, 5 years on count 3s, and 3 years on both counts 4s and 5s, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released with 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall comply with the fifteen (15) standard conditions that have been adopted by this Court, and shall comply with the additional conditions listed.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

☐ The drug testing condition for offenses committed on or after September 13, 1994 is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

## STANDARD CONDITIONS OF SUPERVISION

While defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do by the probation officer;
10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
14) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.
15) The defendant shall notify the probation office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessment.

## ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not illegally possess a controlled substance.

The defendant shall not possess a firearm or other destructive device.

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the installment payment schedule.

The defendant shall participate in a mental health treatment program under a co-payment plan which may include urine testing at the direction and discretion of the probation officer. As part of the co-payment program, the defendant will be held responsible for 3% per $100.00 of his net wages as determined by the probation office. If the defendant is unemployed or receiving public assistance, the defendant will be held responsible for a co-payment of $10.00 per month. Payments are to be made on a per visit basis.

It is further ordered that the defendant shall pay to the United States a special assessment of $400.00, which shall be due immediately.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| | $400.00 | waived | not an issue |

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____.

| | | | |
|---|---|---|---|
| Totals: | $400.00 | waived | not an issue |

## FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

## RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | *Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| Totals: | $ | $ | $ |

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ Special assessment is payable in full immediately; or, if not paid immediately, payments shall be made from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

B ☐ $_____ immediately, balance due (in accordance with C, D, or E; or

C ☐ not later than _____; or

D ☐ in installments to commence ____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in monthly installments of ____ to commence _____ days after the date of his release from federal custody. The defendant shall make fine payments from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall be come a condition of supervision.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the costs of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

## STATEMENT OF REASONS

☒ The 2000 edition of the U. S. Sentencing Guidelines have been used in this case. The Court adopts the undisputed findings of the presentence report and adopts, by reference, the findings previously made regarding the defendant's objections to the report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

**Guideline Range Determined by the Court:**

Total Offense Level: 34

Criminal History Category: III

Imprisonment Range: 188 to 235 months on count 1s
188 to 235 months on count 3s
120 months on count 4s
Mandatory 5 years on count 5s, consecutive

Supervised Release Range: 3 to 5 years on counts 1s, 3s
2 to 3 years on counts 4s, 5s

Fine Range: $17,500 to $6,500,000

☒ **Fine waived** or below the guideline range because of inability to pay.

Total Amount of Restitution: not an issue

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Reasons stated on record.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

UNITED STATES of America, Plaintiff-Appellee,
v.
Freeman HOLMAN, Defendant-Appellant.

**No. 01-1535.**

Argued Feb. 13, 2002.
Decided Dec. 16, 2002.
Rehearing and Suggestion for Rehearing En Banc Denied Jan. 16, 2003.*

Defendant was convicted by jury in the United States District Court for the Northern District of Indiana, William C. Lee, Chief Judge, of possession of cocaine base with intent to distribute, possession of firearm and ammunition by felon, and carrying firearm during and in relation to drug trafficking crime. Defendant appealed. The Court of Appeals, Williams, Circuit Judge, held that: (1) defense counsel's concession of defendant's guilt on one count of possession with intent to distribute cocaine base during opening statement constituted deficient performance, absent evidence that defendant consented to concession; (2) defendant suffered no prejudice as result of counsel's concession; (3) fact that defendant initiated disciplinary inquiry against counsel was not enough to establish actual conflict of interest; and (4) district court's finding that defendant lied when he testified that drugs were planted on him supported two-level enhancement for obstruction of justice.

Affirmed.

West Headnotes

**[1] Criminal Law Key 1119(1)**
*110k1119(1) Most Cited Cases*

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* Judge Flaum did not participate in consideration of this matter.

Court of Appeals reviews claim of ineffective assistance of counsel on direct appeal when defendant's claim can be fully evaluated based only on record below, and not extrinsic evidence. *U.S.C.A. Const. Amend. 6.*

**[2] Criminal Law Key 641.13(2.1)**
*110k641.13(2.1) Most Cited Cases*

Counsel's concession of defendant's guilt to one count of multi-count indictment to bolster case for innocence on remaining counts is valid trial strategy which, by itself, does not rise to level of deficient performance required to support claim for ineffective assistance of counsel. *U.S.C.A. Const. Amend. 6.*

**[3] Criminal Law Key 641.13(2.1)**
*110k641.13(2.1) Most Cited Cases*

Counsel's concession of defendant's guilt on one count of possession with intent to distribute cocaine base during opening statement at defendant's trial on four counts of drug trafficking and possessing firearm constituted deficient performance, as required to support claim for ineffective assistance of counsel, absent evidence that defendant consented to counsel's concession. *U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.*

**[4] Criminal Law Key 641.13(2.1)**
*110k641.13(2.1) Most Cited Cases*

*Strickland* imposes requirement on attorney to consult with defendant on important decisions and to keep defendant informed of important developments in course of prosecution. *U.S.C.A. Const.Amend. 6.*

**[5] Criminal Law Key 641.13(2.1)**
*110k641.13(2.1) Most Cited Cases*

Counsel's concession of defendant's guilt to one count of multi-count indictment without any indication of defendant's consent to such strategy is deficient conduct, as required to support claim for ineffective assistance of counsel. *U.S.C.A. Const.Amend. 6.*

**[6] Criminal Law Key 641.13(2.1)**
*110k641.13(2.1) Most Cited Cases*

Defendant suffered no prejudice as result of counsel's deficient performance in conceding defendant's guilt on one count of possession with intent to distribute cocaine base during opening statement at defendant's trial on four counts of drug trafficking and possessing firearm without defendant's consent, as required to support claim for ineffective assistance of counsel, given evidence against defendant on that count. *U.S.C.A. Const.Amend. 6.*

**[7] Criminal Law Key 920**
*110k920 Most Cited Cases*

Conflict of interest between defendant and his trial counsel would be violation of Sixth Amendment, entitling defendant to new trial. *U.S.C.A. Const.Amend. 6.*

**[8] Criminal Law Key 641.5(.5)**
*110k641.5(.5) Most Cited Cases*

To prevail on claim of violation of Sixth Amendment based on conflict of interest between defendant and counsel, defendant must show that his attorney possessed actual conflict of interest with his client and that his performance was adversely affected because of that conflict. *U.S.C.A. Const.Amend. 6.*

**[9] Criminal Law Key 1139**
*110k1139 Most Cited Cases*

Issue of whether there is conflict of interest between defendant and counsel in violation of Sixth Amendment is mixed question of law and fact that Court of Appeals reviews de novo. *U.S.C.A. Const.Amend. 6.*

**[10] Criminal Law Key 641.5(.5)**
*110k641.5(.5) Most Cited Cases*

Fact that defendant initiated disciplinary inquiry against his attorney after trial and before sentencing for drug trafficking was not enough to establish actual conflict of interest to support defendant's claim of violation of Sixth Amendment, since defendant was not prejudiced by any alleged missteps committed by either his attorney or court during his sentencing hearing. *U.S.C.A. Const.Amend. 6.*

**[11] Criminal Law Key 641.5(.5)**
*110k641.5(.5) Most Cited Cases*

Actual conflict of interest between defendant and counsel, in violation of Sixth Amendment, exists if attorney is torn between two different interests. *U.S.C.A. Const.Amend. 6.*

**[12] Criminal Law Key 641.5(.5)**
*110k641.5(.5) Most Cited Cases*

To prevail on claim of violation of Sixth Amendment based on conflict of interest between defendant and counsel, defendant must demonstrate that he was prejudiced by counsel's actions stemming from alleged conflict. *U.S.C.A. Const.Amend. 6.*

**[13] Sentencing and Punishment Key 761**
*350Hk761 Most Cited Cases*

District court's finding that defendant lied when he testified that drugs were planted on him or in his car at trial for drug

trafficking was sufficient to support two-level enhancement for obstruction of justice under Sentencing Guidelines. *U.S.S.G. § 3C1.1,* 18 U.S.C.A.

**[14] Sentencing and Punishment Key 996**
*350Hk996 Most Cited Cases*

Separate findings of fact regarding each element of perjury are not strictly necessary to uphold obstruction of justice enhancement under Sentencing Guidelines; as long as trial court determined that defendant lied to judge and jury about matters crucial to question of defendant's guilt, that is sufficient. *U.S.S.G. § 3C1.1,* 18 U.S.C.A.

***838** *Robert N. Trgovich* (argued), Office of the U.S. Atty., Fort Wayne, IN for Plaintiff-Appellee.

Dawn R. Connelly (argued), David S. Rosenbloom, McDermott, Will & Emery, Chicago, IL, for Defendant-Appellant.

Before *COFFEY, MANION,* and *WILLIAMS,* Circuit Judges.

***839** *WILLIAMS,* Circuit Judge.

Freeman Holman, the defendant in this direct appeal, claims that he received ineffective assistance of counsel because during trial his attorney conceded guilt to one of the four counts he faced. He also alleges that the district judge erred when calculating his sentence. We find that he was not deprived of his Sixth Amendment right to the effective assistance of counsel and that no reversible errors were made during his sentencing.

## I. BACKGROUND

On July 31, 1999, Holman was arrested on his way to meet Joyce Lawson, a police informant who arranged to meet Holman and purchase a small quantity of crack cocaine from him. As a result, he was indicted on one count of

knowing and intentional possession of cocaine base with intent to distribute in violation of *21 U.S.C. § 841(a)(1)* (Count I). A few months later, Holman was arrested when officers found a revolver and crack cocaine in his car. A superceding indictment added three charges based on his second arrest — possession of cocaine base with intent to distribute, possession of a firearm and ammunition by a felon in violation of *18 U.S.C. §§ 922(g)(1)* and *924(a)(2)*, and carrying a firearm during and in relation to a drug trafficking crime in violation of *18 U.S.C. § 924(c)(1)* (Counts II-IV). Holman was found guilty on all counts by a jury after a two-day trial, sentenced to 248 months' imprisonment, and now appeals.

## II. ANALYSIS

### A. Ineffective Assistance of Counsel

[1] Holman claims he was denied effective assistance of counsel because his attorney conceded at trial that Holman was guilty of Count I. His challenge is based on the familiar standard of *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)*, which requires that defendants show that their attorney's performance was deficient and that they suffered prejudice as a result of this deficient performance. *Id. at 688, 692, 104 S.Ct. 2052.*[1] Such

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[1] It is possible to argue that by conceding his client's guilt, Holman's attorney "fail[ed] to subject the prosecution's case to adversarial testing," something found per se prejudicial in *United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)*. However, as the Supreme Court recently re-emphasized in *Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)*, *Cronic* only applies if counsel fails to contest *any* portion of the prosecution's case; if counsel mounts a partial defense, *Strickland* is the more appropriate test. *See id., 122 S.Ct. at 1851; Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002)* (en banc), *petition for certiorari denied, ___ U.S. ___, 123 S.Ct. 676, 154 L.Ed.2d 567 (2002); see also Earl Wiley v. Sowders, 647 F.2d 642 (6th Cir.1981)* (conceding guilt to first-degree burglary *and* being a persistent felony

claims are mixed questions of law and fact that we review de novo. *United States v. Shukri, 207 F.3d 412, 418 (7th Cir.2000). Strickland* claims are usually discussed in writs of habeas corpus, but we review them on direct appeal when the defendant's claim can be fully evaluated based only on the record below, *Id. at 418,* and not extrinsic evidence. *United States v. Godwin, 202 F.3d 969, 973 (7th Cir.2000); United States v. Taglia, 922 F.2d 413, 417 (7th Cir.1991).*

1. Deficient Performance Under *Strickland*

Holman must describe "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" to show that his counsel was performing deficiently. *Strickland, 466 U.S. at 687, 104 S.Ct. 2052.* The evaluative standard we hold attorneys to in ***840** this regard is "simply reasonableness under prevailing professional norms." *Id. at 688, 104 S.Ct. 2052.* When evaluating an attorney's conduct, our review is "highly deferential," with the underlying assumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id. at 689, 104 S.Ct. 2052.* Whether something is reasonable or not is based on the facts of the particular case, viewed at the time of counsel's conduct. *Id. at 690, 104 S.Ct. 2052.*

*a) Trial strategy*

Holman's attorney began his opening statement by acknowledging that "on July 31st, 1999, Freeman Holman readily admits that he had cocaine in his pocket." He then explained:

> We're not going to sit here and say, oh, no, he didn't have it, because he did. He had the point six eight

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offender); *United States v. Swanson, 943 F.2d 1070 (9th Cir.1991)* (conceding guilt to one count of bank robbery); *cf. Scarpa v. DuBois, 38 F.3d 1, 12-14 (1st Cir.1994)* (collecting cases).

> or nearly point seven grams of the cocaine, point seven gram [sic] of cocaine crack base in his pocket. We are not going to attempt to deny that in any way, because that is the truth.

During the presentation of evidence, Holman's attorney limited his cross-examination of the prosecution's witnesses to issues raised in Counts II-IV and did not ask any questions regarding Count I. Similarly, when presenting defense witnesses (including Holman), he avoided any discussion of the events surrounding Count I and only asked questions relating to Counts II-IV. During closing argument, Holman's attorney not only conceded that his client possessed drugs as alleged in Count I, but told the jury how to fill out the verdict form, saying:

> [W]hen you go back to the Jury room we want you to look for Count I and Verdict From 1 and where it says less than five grams, put an "X" there, date it, and sign it, because that's what the evidence showed. He possessed point six eight grams of cocaine. And as the evidence went in, it certainly appeared that he was going to deliver it to Joyce Lawson. No problem with that, because that's the truth.

[2] Though an unusual defense strategy, we have held that conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance. *See United States v. Wilks, 46 F.3d 640, 644 (7th Cir.1995); Underwood v. Clark, 939 F.2d 473, 474 (7th Cir.1991); United States v. Simone, 931 F.2d 1186, 1195 (7th Cir.1991); see also Anderson v. Calderon, 232 F.3d 1053 (9th Cir.2000); United States v. Williamson, 53 F.3d 1500 (10th Cir.1995).* Conceding an indefensible charge is thought to build credibility with a jury by acknowledging the overwhelming evidence of guilt for that particular charge, creating goodwill and trust that can be applied towards arguments attacking the re-

maining charges. *See Simone, 931 F.2d at 1196* ("[W]hen the admissions concern only some of the charges to be proven, or when they do not actually concede guilt, counsel's concessions have been treated as tactical retreats and deemed to be effective assistance."); *Wilks, 46 F.3d at 644* ("In conceding Wilks's guilt with respect to the one ounce transaction [but not a different transaction involving larger drug quantities], counsel lent credibility to his argument that Wilks was only a small fish in the drug world."); *see also Calderon, 232 F.3d at 1089.*

Here, while conceding Count I and its underlying facts, *i.e.*, that on July 31, 1999, his client possessed less than a gram of cocaine base and intended to sell it to Lawson, Holman's attorney vigorously cross-examined the prosecution's witnesses regarding Counts II-IV, focusing on gaps ***841** in the prosecution's evidence.[2] Right after he conceded his client's guilt on Count I, Holman's attorney told the jury "[w]hat we don't want are convictions on the other three charges." He then described the weaknesses in the prosecution's case, including the possibility that evidence was planted in Holman's car or fabricated, and reiterated his client's defense to Counts II-IV. This decision to emphasize the defense against Counts II-IV while conceding guilt on Count I was a coherent trial strategy that, by itself, was not deficient. *See Wilks, 46 F.3d at 644; Simone, 931 F.2d at 1197; see also Williamson, 53 F.3d at 1511-12.*

*b) Client's consent*

[3][4] While we have concluded that conceding guilt to one count of a multi-count indictment is a valid defense strategy, the manner of its execution in this case greatly

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[2] Count I carried no statutory mandatory minimum sentence under *21 U.S.C. § 841* since the amount in question was less than a gram. Counts II-IV, on the other hand, carried statutorily required minimum sentences.

concerns us. *Strickland* imposes few requirements on attorneys, but one it specifically enumerates is "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland, 466 U.S. at 688, 104 S.Ct. 2052.* Such consultation is an ethical cornerstone of the legal profession. See MODEL RULE OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonable necessary to a permit the client to make informed decisions regarding the representation."); IND. PROF'L CONDUCT R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.").

While we and our sister courts have approved of the strategy that Holman complains of, there has usually been evidence in the record of a client's consent to the strategy, *see, e.g., Wilks, 46 F.3d at 643* (defendant indicated to judge that he was satisfied with his attorney's performance at the conclusion of evidence), or later ratification of the strategy. See, *e.g., Simone, 931 F.2d at 1196 n. 13* (defendant's letter sent to trial judge post- trial suggested that he would have conceded more than what his attorney actually admitted).

Here, unlike other cases, we have no indication from the trial or sentencing transcripts whether Holman's attorney had his client's consent to pursue such a strategy. Nor do we have post-trial evidence of consultation or consent. The only evidence of Holman's opinions regarding his attorney's conduct is a reference during the sentencing hearing to a letter that Holman sent to the Indiana Supreme Court Disciplinary Commission after his trial. While the contents of the letter are not known, we surmise that Holman considered his attorney's behavior egregious enough to warrant disciplinary action. During the hearing, Holman's attorney told the court that he received a response letter from the Indiana Disciplinary Commission stating that he had done nothing

wrong. While it is possible that Holman's letter professed a valid complaint, these letters can also be expressions of "sour grapes" that result from high-risk trial strategies that fail. Without the letter itself in the record, and left with only a reference to it, we cannot consider the letter an expression of Holman's disapproval of his attorney's conduct for purposes of establishing lack of consent, given the possibility that the letter could have presented a frivolous claim, and taking into ***842** account Holman's own failure to attach any probative weight to the letter.

Without any indication as to whether Holman agreed to, dissented from, or even was aware of his attorney's plan to concede guilt, the question is whether it must be shown that Holman consented to such a strategy. As we said in *Simone*, "[w]e do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner," *931 F.2d at 1197; see also Felker v. Thomas, 52 F.3d 907, 911 (11th Cir.1995)* ("[T]rial counsel cay not concede the guilt of a defendant who has pleaded not guilty, at least not without the defendant's consent. That is true enough as to the guilt stage.") (emphasis added).[3]

We draw guidance from a pair of Sixth Circuit cases involving Earl and Elmer Wiley. The Wileys were on trial for

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[3] The Fifth Circuit found differently in *Haynes*, where a defendant on trial for first-degree murder in Louisiana objected on the record to the judge (but outside the presence of the jury) to his attorney's concession to guilt of second-degree murder. In his federal habeas petition, Haynes argued that this amounted to an impermissible concession under *Cronic*. The Fifth Circuit held that *Strickland* was the proper standard, then bypassed the issue of consent, finding that this was a suitable tactic for such a serious crime, since it hopefully prevented the jury from finding Haynes eligible for the death penalty. *See 298 F.3d at 382*. The court also found that Haynes was not prejudiced by the defense counsel's concession, given that it spared him from death, and reversed the panel's grant of Haynes's habeas corpus petition. *See id. at 383*.

burglary and during closing argument, Earl Wiley's attorney (speaking on behalf of both brothers), told the jury [U]nfortunately for these two men that you see here today, they are guilty. They're guilty as charged by the Commonwealth's Attorneys's office.... Ladies and gentlemen of the jury, [the prosecutor] has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime. We don't have stars in our eyes, and we never have. They're guilty. *Earl Wiley v. Sowders, 647 F.2d 642, 645 (6th Cir.1981)*. Both brothers were convicted on all counts and brought separate habeas corpus petitions alleging ineffective assistance of counsel.

Reviewing the habeas petitions separately, the Sixth Circuit found no indication as to whether or not Earl Wiley's lawyer conferred with his client about conceding guilt (as in Holman's case), and held that Earl Wiley "was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy." *Id.* It went on to find (though the case predates *Strickland*) that the evidence against the Wileys was very circumstantial (*i.e.*, in *Strickland* parlance, that Earl Wiley was prejudiced by his attorney's concession), and granted Earl Wiley's petition. On the other hand, Elmer Wiley's attorney submitted an affidavit as part of the habeas corpus proceedings stating that Elmer discussed the concession strategy with his attorneys and that he consented to it. *Elmer Wiley v. Sowders, 669 F.2d 386, 389 (6th Cir.1982)*. Since Elmer's consent was in dispute, the Sixth Circuit remanded the petition to the district court to determine whether Elmer Wiley in fact consented to the trial strategy. *See id.* It also noted "that an on-the-record inquiry by the trial court to determine whether a criminal defendant has consented to an admission of guilt during closing argument represents the preferred practice. But we did not hold in [Earl] *Wiley*, and we do not hold now, that due process requires such a practice." *Id.*

*843 [5] We agree with the Sixth Circuit that obtaining a defendant's consent on the record in open court is the preferred method of forestalling any issues of consent that could come up later on appeal, *see Elmer Wiley, 669 F.2d at 389; Earl Wiley, 647 F.2d at 650.* We also agree that other methods, such as an affidavit from the defendant describing his discussions with his attorney and consent to the strategy, could work just as well. *See, e.g., United States v. Agee, 83 F.3d 882, 886 (7th Cir.1996).* ("[S]pecific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal [when pleading guilty] if there is other evidence in the record demonstrating a knowing and voluntary waiver."). Given the importance of the constitutional rights implicated when guilt is conceded and the ethical obligations of attorneys to consult with their clients, we also agree with the Sixth Circuit's conclusion in *Earl Wiley* that an attorney's concession of a client's guilt without any indication of the client's consent to the strategy is deficient conduct for *Strickland* purposes.[4]

Although Holman does not specifically articulate his appeal based on *Rule 11*, we think that his counsel's deficient performance was based on a violation of *Rule 11*'s procedures. Though the concession of guilt was made during trial and not before, Holman's counsel essentially gave up the same constitutional rights that Holman would have relinquished had he plead guilty to Count I before trial.

As outlined in *Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)*, pleading guilty before trial implicates the privilege against self-incrimination, the right to trial by jury, and the right to be able to confront one's accusers. *See id. at 243, 89 S.Ct. 1709.* By conceding

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[4] Because this is a direct appeal and not a review of a habeas corpus petition, we do not have the option of remanding to the district court to determine whether or not Holman in fact consented or not to his attorney's strategy. *See Elmer Wiley, 669 F.2d at 389.*

guilt to Count I at the beginning of trial, Holman's attorney bypassed all these rights on behalf of his client; he admitted to those facts that were the elements of Count I; the jury was never given a chance to render a verdict on Count I based on an adversarial proceeding; and during cross-examination of the prosecution's witnesses, Holman's attorney did not ask any questions regarding Count I.

This was not a situation where the concession was made at the very end of trial, where the attorney realized after the close of evidence that there was no hope of a favorable verdict and that conceding guilt to one charge would hopefully preserve some credibility for the defense's arguments opposing the other counts. Rather, Holman's attorney decided from the very beginning that Count I was not worth fighting over and relinquished those constitutional rights of his client which *Rule 11* was designed to protect. *See Boykin, 395 U.S. at 243 n. 5, 89 S.Ct. 1709; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).*

Here, Holman's rights are protected by *Rule 11*'s extensive procedures, which distinguishes his situation from *United States v. Cooper, 243 F.3d 411 (7th Cir.2001)*, where we held that defendants must show that they disapproved of their attorney's waiver of their client's right to cross-examine a witness in order to pursue a Rule 52(b) appeal based on the alleged waiver without consent. *See id. at 418.*[5]

***844** Most recently, in *Taylor v. United States*, we decided that it was not necessary for a defendant who chooses not to testify to make such a waiver on the record. *287 F.3d 658, 661 (7th Cir.2002).* However, in *Taylor*, actual consent was not in doubt — the attorney and defendant discussed the decision and the defendant decided to not testify. *See id. at 662. Taylor's* concern was with the "undue

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[5] A similar showing of consent is also required when defendants waive their right to appeal. *See United States v. Robinson, 8 F.3d 418, 423-25 (7th Cir.1993).*

formality that might undermine confidence" between an attorney and his client. We noted that "[p]erhaps a statute or rule could require warnings and waivers despite these costs, but no such statute or rule is on the books." *Id.* In this case, we have *Rule 11(d)*, which directs courts to "not accept a plea of guilty or nolo contendre without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." *See United States v. Krilich, 159 F.3d 1020, 1026 (7th Cir.1998)* ("A waiver is voluntary in the absence of coercion, and is knowing if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.") (citations omitted). Our concern is not over a ritualistic incantation in open court, but rather that the decision to concede guilt is made voluntarily by the defendant and that the defendant ultimately decides which strategy to pursue. *See United States v. Woolley, 123 F.3d 627, 632 (7th Cir.1997).*

We consider counsel's conduct deficient in this case because there is no evidence of a defendant's consent to a concession of guilt; to think otherwise would leave open a side door that would allow attorneys to abandon their clients. *Rule 11* ensures that a guilty plea is made freely and knowingly, but if a defendant pleads not guilty, he enjoys no protection against an appeal to the jury to find him guilty. A similar side door — stipulating without a defendant's prior consent to facts which prove the defendant's guilt despite a not guilty plea — has long been closed. *See United States v. Franzen, 668 F.2d 933, 941 (7th Cir.1982)* ("[I]t has long been the law of this circuit that counsel may not stipulate to facts establishing the guilt of the accused without the defendant's consent.") (citing *Achtien v. Dowd, 117 F.2d 989, 993-94 (7th Cir.1941)*). Closing off this loophole in our

jurisprudence safeguards against a very uncommon, but nevertheless worrisome, course of events.[6]

Notwithstanding our finding that Holman's attorney performed deficiently, we affirm Holman's conviction, because he suffered no prejudice as a result of his attorney's conduct.

2. Prejudice Under *Strickland*

[6] While we find that Holman's attorney's conduct was deficient, we have determined that Holman suffered no prejudice as a result. Holman would have been prejudiced if there was "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694, 104 S.Ct. 2052.*

***845** Though Holman's attorney conducted only cursory cross-examination of the prosecution's witnesses and did not call any witnesses to rebut the prosecution's case regarding Count I, it is difficult to imagine how he could have mounted an effective defense that would have challenged either Holman's possession of the cocaine or his intent to sell it to Lawson. According to Lawson's testimony and that of Tracy Broxon of the Fort Wayne Police Department, Lawson called Holman and told him she wanted to buy some crack from him. Holman told her to go to a certain

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[6] As we have noted, we are constrained by the procedural posture of this case to only look at the trial record, in contrast to habeas corpus cases where we have a larger record to draw from and the opportunity to remand for more evidentiary hearings. *See United States v. Asubonteng, 895 F.2d 424, 428 (7th Cir.1990).* Having indications of consent to a concession strategy appear on the record also helps prevent defendants from hiding their consultations with their attorneys behind the shield of direct appeal instead of having them come to light in the fuller investigative process of habeas corpus proceedings. *See Agee, 83 F.3d at 886 n. 5; Robinson, 8 F.3d at 425.*

gas station and call him for further instructions. Accompanied by Broxon and two other officers, Lawson went to the gas station as directed and called Holman again. Holman answered the phone and told her he was coming outside to meet her. When Holman was seen leaving a hotel across the street approaching Lawson, police officers arrested him and found the cocaine.

While his attorney relentlessly pursued the idea that the police planted cocaine on Holman and in his car when they arrested him the second time, there is no indication that this strategy was feasible for Count I. In addition, Holman's intent to sell the cocaine to Lawson would be very difficult to refute, since he did not leave the hotel until Lawson called and asked that the cocaine be delivered. We have no evidence of improper investigative techniques on the part of the police, nor do we have testimony from Holman that would undermine the government's case. It is possible that Holman could argue that the concession of guilt to the first cocaine possession count tainted him, making the jury predisposed to thinking of him as a drug dealer when they considered the other counts, but the weight of the evidence suggests that this is a dubious argument at best.

We find, in applying the prejudice prong of *Strickland,* that the strategy used by Holman's attorney regarding Count I did not have a reasonable probability of affecting the trail's outcome, *see Strickland, 466 U.S. at 695, 104 S.Ct. 2052; Simone, 931 F.2d at 1196,* and affirm his conviction.

B. Sentencing Issues

[7] [8] [9] Holman raises three arguments related to his sentencing. First, he argues that a conflict of interest existed between him and his trail counsel during the sentencing proceeding as a result of his letter to the Indiana Supreme Court Disciplinary Commission. Such a conflict would be a violation of the Sixth Amendment, entitling

Holman to a new trial. *Strickland, 466 U.S. at 693, 104 S.Ct. 2052; Cuyler v. Sullivan, 446 U.S. 335,350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).* To prevail on this claim, Holman must show that his attorney possessed an actual conflict of interest with his client and that his performance was adversely affected because of that conflict. *See Stoia v. United States, 109 F.3d 392, 395 (7th Cir.1997).* This issue, as with the *Strickland* claim above, is a mixed question of law and fact that we review de novo. *Spreitzer v. Peters, 114 F.3d 1435 (7th Cir.1997).*

[10] [11] [12] The fact that Holman initiated a disciplinary inquiry against his attorney is not enough to establish an actual conflict of interest. An actual conflict exists if an attorney is torn between two different interests. *See Stoia, 109 F.3d at 395.* Once again, Holman must demonstrate that he was prejudiced by actions stemming from the alleged conflict. *See Cates v. Superintendent, Indiana Youth Center, 981 F.2d 949, 955 (7th Cir.1992).* As we explain below, we do not find that he was prejudiced by any of the alleged missteps committed by either his attorney or the court during his sentencing hearing. In addition, we agree with the Fourth Circuit that allowing conflicts of interest to be established ***846** solely by appealing to disciplinary authorities, without knowing the substance of the complaint, would encourage filing of frivolous claims by defendants for purposes of delay. *See United States v. Burns, 990 F.2d 1426, 1438 (4th Cir.1993).* Left without an actual conflict, Holman's conflict of interest claim fails.

Second, Holman argues that the level used to calculate his sentence under the Sentencing Guidelines was improperly based on facts not raised at trial. Since he did not raise these objections during his sentencing hearing, we review for plain error. *United States v. Davis, 15 F.3d 1393, 1406-07 (7th Cir.1994).* He suggests that we should expand our reading of *Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),* so that *any* fact that en-

hances a sentence must be charged in an indictment *and* proven beyond a reasonable doubt, whether or not the sentence exceeds the statutory maximum. We have rejected similar arguments many times, *see, e.g., United States v. Bjorkman, 270 F.3d 482, 492 (7th Cir.2001)*, and again decline to expand *Apprendi*. Because the statutory maximum sentence for possession of cocaine base, without regard to quantity, is 240 months and Holman was sentenced to 188 months for these offenses, *Apprendi* does not apply and we uphold his sentence. *See Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir.2000)*.

[13] [14] Holman's final claim is that the trial judge failed to make proper findings when imposing a two-level enhancement for obstruction of justice under Sentencing Guideline *§ 3C1.1*. His attorney objected to the general principle of the enhancement, but did not make any objection to the findings of fact the judge made during the sentencing hearing, so our review is for plain error. *See United States v. Danser, 270 F.3d 451, 454 (7th Cir.2001)*. Though we agree that more specific findings as to which of Holman's statements the court considered untruthful would have been preferable, we have held that separate findings of fact regarding each element of perjury are not strictly necessary to uphold an obstruction of justice enhancement under *§ 3C1.1*. As long as the trail court determined that the defendant lied to the judge and jury about matters crucial to the question of the defendant's guilt, that is sufficient. *See United States v. White, 240 F.3d 656, 662 (7th Cir.2001)*. Here, the trial court found that Holman lied when he said that drugs were planted on him and/or his car. We consider this sufficient to describe a "failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case," *United States v. Dunnigan, 507 U.S. 87, 95, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)*, and therefore affirm Holman's sentence.

## III. CONCLUSION

For these reasons we AFFIRM Freeman Holman's conviction and sentence.

314 F.3d 837

END OF DOCUMENT

LEXSEE 2003 U.S. App. LEXIS 754

**United States of America, Plaintiff-Appellee, v. Freeman Holman, Defendant-Appellant.**

**No. 01-1535**

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**2003 U.S. App. LEXIS 754**

**January 16, 2003, Decided**

**PRIOR HISTORY:**
[*1]

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 99 CR 62. William C. Lee, Chief Judge. United States v. Holman, 2002 U.S. App. LEXIS 25748.

**JUDGES:**

Before Hon. John L. Coffey, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge.

**OPINION:**

**ORDER**

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by counsel for Defendant-Appellant Freeman Holman on December 30, 2002, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.[1]

Accordingly, the petition for rehearing is DENIED.

FILED
2003 APR-8 PM 3:30

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[1] Judge Flaum did not participate in consideration of this matter.

STEPHEN R. LUDWIG, CLERK
U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**FORT WAYNE DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CAUSE NO. 1:99cr62 |
| FREEMAN HOLMAN | ) | |
| Defendant. | ) | |

ORDER

This matter is before the court on a "Motion to Supplement Record on Appeal", filed by the defendant Freeman Holman ("Holman"), on March 17, 2003. The government responded to the motion on March 21, 2003, to which Holman replied on March 28, 2003.

For the following reasons, the motion will be denied.

Discussion

On March 1, 2003, this court entered judgement in this case, and on December 16, 2002, the United States Court of Appeals for the Seventh Circuit affirmed this court's judgment, in an opinion reported at 314 F.3d 837. Holman is currently in the process of petitioning the United States Supreme Court for a Writ of Certiorari.

Holman claims that the record in this case omitted his letter for a request for investigation of his trial counsel, which was sent to the Indiana Supreme Court Disciplinary

Commission on December 21, 2000. Holman points out that this court referred to the letter during Holman's sentencing, and that the Court of Appeals also referenced the letter. Holman thus argues that the letter should be made part of the record.

In response, the government assumes that Holman is seeking to supplement the record under Fed.R. App. Pro. 10(e), and argues that Holman's request does not fall within the parameters of that rule. However, it is clear that the Federal Rules of Appellate Procedure govern procedure in the United States courts of appeals, and are not relevant to appeals to the United States Supreme Court. *See* Fed.R.App. Pro. 1. Turning to the Supreme Court Rules, Rule 14 governs the content of a petition for a writ of certiorari. More specifically, Rule 14(i)(vi) provides that the appendix accompanying the writ may contain "any other material the petitioner believes essential to understand the petition."

In his reply, Holman states that his concern is that "the absence of the actual letter from the appellate record has been the cause of speculation as to its contents". As Holman is permitted by the Supreme Court Rules to include "any other material" in his appendix accompanying his writ of certiorari, there is no reason for this court to supplement the record. In any event, there is no evidence that the letter was ever part of the record in this case. As supplements to the record are generally only granted when part of the record was mistakenly omitted, this court has no basis for adding non-record material to the record. Accordingly, Holman's motion will be denied.

## Conclusion

On the basis of the foregoing, Holman's "Motion to Supplement the Record on Appeal" is hereby DENIED

Entered: April 8, 2003.

/s/ WILLIAM C. LEE
William C. Lee, Judge
United States District Court

# REQUEST FOR INVESTIGATION

Freeman Holman
Your Name (Please type or print in ink)

417 S. Calhoun St
Address

Fort Wayne, IN 46802
City/State/Zip

(219)
Telephone

*Return to:*

Indiana Supreme Court
Disciplinary Commission
115 West Washington
Street, Suite 1165 S.
Indianapolis, IN 46204-3417
Phone (317) 232-1807
TDD for Deaf
(317) 233-6111

I wish to submit the following Request for Investigation and information concerning the following attorney:

Attorney's Name Nikos C. Nakos

Attorney's Address Nakos Law Office on the landing

126 W. Columbia St Suite 200 Ft Wayne IN 46802

Date Employed 10-28-99

Purpose for Employing Repersentation in Criminal law

Cause Number of Case 1:99-CR-62

Court United States District Court

Northern Dist. Ft Wayne

Agreed Attorney's Fee 4,000 Total Fees Paid 2,500

Nature of complaint against the attorney (use additional pages if necessary; do not write on the back). Please be specific as to dates, names, and events. Include copies (not originals) of documents that support your complaint.

I hired Nikos C. Nakos 10-99 to rep. for a drug charge. I told Mr. Nakos that my rights were violated by the officers that made the arrest on the drug charges. I ask Mr. Nakos to prepare a motion to surpress the evidence because the officers pulled me over for no reason. The motion was filed in 3-2000 by Mr. Nakos improperly. In that motion

Mr. Nakos stated the Terry-v-Ohio Case, which talks about probable cause to stop a vehicle in the beginning. The motion he prepared stated, "I'm not disputing my client ran a stop sign or failed to use his turn signal". That statement was improper and disregards the Terry-v-Ohio Case altogether.

In filing this Request for Investigation, I understand that the attorney will receive a copy. I further understand that I am immune from civil suit for statements I make without malice to the Commission. However, this immunity may be lost if I make the same statements to others. I agree to cooperate with the Commission and to testify at any hearing that may be held.

VERIFICATION

I swear or affirm, under the penalties for perjury, that the foregoing statements are true.

Freeman Holman

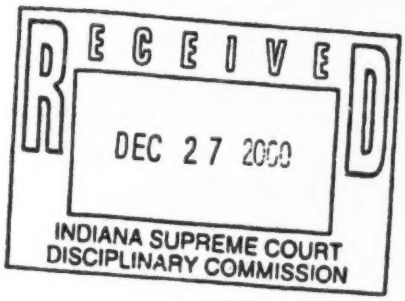
Signature (Only original signatures accepted.)

12-21-2000

Date

12-27-00

Date Filed (Office use only) GW.




Freeman Holman
In Supreme Court Disciplinary Com
417 So Calhoun St. Ft. Wayne, In. 46802

My trial was held on 12-13-2000, and before my trial Mr. Nakos tried everything in his power to get me to plead guilty. I told Mr. Nakos that I'm innocent of the charges that are against me in the United States District Court, Northern Dist. of In. and I donot wish to plead guilty.

During my trial Mr. Nako's never called the two witnesses I requested. He told me that it would be a bad ideal to call them as witnesses. Then to top it all off, he ask the jurror's to find me guilty of count one but not guilty of count's two, three, and four. Why would my lawyer tell the jurrors to find me guilty?

On April 7, 2000 Debby Hensley of National legal Professional Associates, a Company I hired to assist Mr. Nakos in the preparation of my trial, contacted him to request or offer thier services to him in preparing my Case. He displayed a little hostility and refused to work with them. Thier address is; Case Analysis and Research Division, 7 Mariners Cove Cincinnati, Ohio 45249 ... Phone 513-247-0082 Fax 513-247-9580. Please help me with this matter, thank you.

Freeman Holman